



WISCONSIN REGULATORY DIGEST

A Publication of the
DEPARTMENT OF REGULATION AND LICENSING
FOR REAL ESTATE LICENSEES

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A Message from the Chair **By James R. Imhoff, Jr.**

The Wisconsin Realtors Association has prepared a legislative proposal that would define “designated agency” and permit licensees to enter into such agency agreements. In view of the recent discussions of this proposal, I feel it appropriate to revisit some of the many issues related to buyer agency and how they relate to Wisconsin law and required standards of practice for real estate licensees.

It is important to note that in 1993 Wisconsin’s law of agency was revised. Since then, Wisconsin real estate licensees have not been permitted to practice common law agency, such as, attorneys (for example). Section 452.133 (1), Wis. Stats., lists seven duties that licensees owe to all parties in a transaction. Please refer to the following Web site for specific language regarding fair dealing, diligence and care, disclosure of material adverse facts, confidentiality, providing accurate information, accounting for property coming into your possession and the presentation of proposals in an objective and unbiased manner:

<http://www.legis.state.wi.us/statutes/01Stat0452.pdf>

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When is a licensee a buyer’s agent?

To be a buyer’s agent, a broker must have a written agency contract (WB-36) with the buyer. Absent this written contract, the agent working with the buyer is the agent for the seller, owing the agent’s first duty of loyalty and faithfulness to the seller, subject to the requirements in s. 452.133 (1).

When must a licensee discuss agency with a potential buyer?

The current rules require that a licensee must provide the Wisconsin-mandated agency disclosure to a potential buyer before providing brokerage services. Certainly this means before showing property. However, a few exceptions have become apparent such as “open houses,” and the REB is discussing some minor changes to this rule. But recently the courts have affirmed the basic requirement for the licensee to provide the agency disclosure before providing brokerage services. Waiting until the offer is written is not appropriate.

Why are real estate licensees acting as buyer’s agents?

The practice of buyer agency has grown substantially over the past 15 years for a number of reasons:

- Buyers are requesting the licensee to act as the buyer’s agent and in the buyer’s best interest, as opposed to the seller’s interest.
- Buyers have been instructed to do so by others, such as their employer.

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- Some transactions may require the licensee to act as a buyer's agent, such as when representing a relative, a close friend or a business partner.
- Buyer's agents can sell "for sale by owners" without having a listing contract.

How are buyer's agents paid?

Buyer's agents can be paid in one of three ways: by the buyer, by the seller, or by the listing company (co-broke). Buyer's agents can negotiate their fee directly with the buyer and not be limited to the fee offered by the listing broker.

Designated agency – what is it?

For a brief explanation, some background is required. When a licensee within a brokerage firm has a listing contract, all agents in that firm are agents of the seller. Likewise, when a licensee has a buyer agency contract with a buyer, all agents within the brokerage firm are agents of the buyer. The brokerage firm, not the individual agent, owns the listing contract and the buyer agency contract.

The issue of dual agency, which is permitted under Wisconsin law, arises when these two contracts, the listing contract and the buyer agency agreement, come together within the same brokerage firm. This means that a buyer's agent is selling a listing held within the buyer's agent's brokerage firm.

This situation may involve two separate agents within the same brokerage firm or one single agent who is involved with both the listing contract and the buyer agency agreement.

Under dual agency, the ability of the buyer's agent to represent the buyer is muted somewhat because of the buyer's agent's agency relationship and obligation to the seller. In reality, a buyer's agent, selling a co-broke listing can do somewhat more for the buyer than when selling a listing within the buyer's agents own firm.

The designated agency proposal would amend state law to allow buyer's agents to provide the same degree of service to the buyer whether selling a co-broke listing or selling a listing within the buyer's agents own firm. The exception would be a buyer's agent selling his or her own personal listing, where added requirements would still apply.

My article here is not to defend or argue against designated agency, as there are many issues on both sides. Much more will be written and discussed on the concept in the years ahead. Many other states have

already amended their laws to allow this concept in varying degrees.

A few years ago, the Real Estate Board created a task force to discuss and establish guidelines for buyer agency. In fact, the task force established a well-defined set of guidelines that delineated the practices that are allowed for both a buyer's agent and a seller's agent (subagent) when selling real estate.

The following is a re-statement of these guidelines as they relate to the most common of everyday practices. As you will see, a buyer's agent can clearly do more for a buyer than an agent acting as the seller's agent (subagent).

Remember, real estate licensees, acting as a buyer's agent or seller's agent, are limited in their performance as an agent by Wisconsin law.

A) Can a licensee recommend or suggest an offering price or give an opinion of the seller's asking price?

Seller agent	Yes	<u> </u>	No	<u> X </u>
Buyer agent	Yes	<u> X </u>	No	<u> </u>

Note: Basically a seller's agent can only quote the list price, but a buyer's agent can suggest an offering price and provide supporting market information on pricing.

B) Can a licensee give a negative opinion or critique of seller's property (beyond disclosing defects)?

Seller agent	Yes	<u> </u>	No	<u> X </u>
Buyer agent	Yes	<u> X </u>	No	<u> </u>

Note: Here again, an agent acting as a seller's agent is obligated to work for their principal, the seller, and present the property in the best light. A buyer's agent is not so governed.

C) Can a licensee disclose the existence of other offers or previous offers (not terms)?

Seller agent	Yes	<u> X </u>	No	<u> </u>
Buyer agent	Yes	<u> X </u>	No	<u> </u>

D) Can a licensee disclose the seller's motivation to sell (without seller's permission)?

Seller agent	Yes	<u> </u>	No	<u> X </u>
Buyer agent	Yes	<u> </u>	No	<u> X </u>

Note: For an agent acting in either capacity to make such a disclosure would violate the confidentiality requirements in s. 452.133 (1) d), Stats.

E) Can a licensee reveal seller's willingness to accept a lower price (without seller's permission)?

Seller agent	Yes	<u> </u>	No	<u> X </u>
Buyer agent	Yes	<u> </u>	No	<u> X </u>

Note: Again, to do otherwise would violate the requirement in s. 452.133, Stats.

F) Can a licensee recommend and assist buyer in negotiation strategies?

Seller agent	Yes	<u> </u>	No	<u> X </u>
Buyer agent	Yes	<u> X </u>	No	<u> </u>

Note: Here it must be noted that an agent acting as a seller's agent owes their first duty to their principal, the seller. Only a buyer's agent may offer strategies benefiting the buyer.

G) Can a licensee disclose confidential information about the buyer? (Unless required disclosure)

Seller agent	Yes	<u> </u>	No	<u> X </u>
Buyer agent	Yes	<u> </u>	No	<u> X </u>

Note: The exception to this issue is the requirement for the buyer's agent to disclose to the seller anything that might be detrimental to the seller. (Example: a recent bankruptcy)

H) Can a buyer's agent draft an offer to purchase, at the direction of the buyer, rejecting the listing broker's offer of compensation (co-broke fee) and asking the seller to pay the buyer's agent's fee at closing?

Answer:

Absolutely. The buyer has a right to negotiate their fees with the buyer's agent, and the buyer has the right to include their transaction cost in their offer to purchase.

Offers have been written for years where the buyer asked the seller to include "closing costs" as part of the offering price. There is no difference between closing costs and asking the seller to pay buyer agency fees -- the buyer is including them in the offer so that they can be included in the financing of the property.

I) What is the proper procedure for the listing company when receiving an offer from a buyer's agent, where the buyer has directed the buyer's agent to reject the co-broke fees offered by the listing company, and then asking the seller to pay the buyer's agent directly at closing?

Answer:

The offer to purchase should be presented to the seller in a positive light explaining the net effect to the seller without recommending the elimination or reduction of the buyer's agent's fee. Should the seller require more net proceeds, the proper procedure would be to counter the offer back to the buyer at a price high enough to cover both, the seller's intended net and the buyer's agent's fee.

Many Wisconsin brokerage firms have the policy in these situations of allowing the listing agent to reduce the listing fee by whatever percent that was offered for a co-broke fee.

Finally, real estate practice in Wisconsin has evolved over the past 15 years with buyer agency. Listing agents and the listing brokerage firms no longer totally control the transactions as to access and the fees paid. The buyer has the right to hire their own agent and establish their own fees and to include them in the offer. A buyer's agent is not limited to the fee offered by the listing company, but only by the fee and terms established with the buyer.

Final Note:

If you encounter a licensee or broker who has not encountered these concepts, keep a copy of this article to share with that agent or broker when involved in a joint transaction. I have had numerous opportunities to speak on these issues around the State of Wisconsin over the past seven years, and I will continue to do so in the years ahead.

Board Membership

The terms of two public members of the Real Estate Board have expired. These members have been replaced by two new members. The Board and the Department are grateful to Bettye Lawrence and Jerome Nelson for having served on the Board for 4 years. We also welcome the two new members, Becky Dysland and Maria Watts.

The second term is Jim Imhoff is drawing to a close. He has been on the Board for 8 years and has served as Chairman of the Board for many of those years. We thank Jim for the many years of service and leadership.

Governor Scott McCallum has nominated Peter Sveum of Stoughton, Wisconsin, to replace Mr. Imhoff after Mr. Imhoff's board membership officially ends (the exact date is a bit uncertain at the time this Digest is being written, because the Senate was not able to take confirmation action on all of the Governor's nominees by the end of the session).

Timeshare Forms

As pointed out to you in the last issue of the Regulatory Digest, two revised timeshare forms were made available by forms publishers. The third form (perhaps, the most needed of the three) is still on hold, because the changes recommended by the Department of Financial Institutions have not yet been made. These changes relate to the truth-in-lending provisions.

Reorganization of the Department

We know that you are not interested in all of the details about the reorganization of the Department of Regulation and Licensing; however, you may find it worthwhile to know that all of the licensing staff are now in the new Division of Professional Credentialing. The Division Administrator is Lori Huntoon. Cleve Hansen is the Administrator of the Division of Board Services. He also continues to be the Director of the Bureau of Direct Licensing and Real Estate. His primary responsibility is to supervise the staff who provide services to all of the boards, committees and councils, relating to all of the professions and occupations regulated by the Department and the boards in the Department. The new Administrator of the Division of Enforcement is Barry Wanner. The former Administrator, Jack Temby, is now the Business Team Supervisor in the Division of Enforcement.Licensing Statistics

Based on information contained in the Department's Biennial Reports, the statistics shown below show the number of licenses that were renewed during each of the listed bienniums. In the usual course of events quite a few licensees do not renew their license; however during the two-year period following the renewal deadline the Department usually issues several thousand new licenses. For example, between July 1, 1999 and June 30, 2001, the Department issued 4096 new licenses to brokers, salesperson and business entities. In any case, since 1990 the actual number of real licenses held by individuals and entities has decreased by approximately 11,000.

Here are the number of license renewals for specified years:

1990 Brokers – 24,744 Salespersons – 8,403 Entities – 1,528 Total: 34,675	1992 Brokers – 18,511 Salespersons – 7,003 Entities – 1,532 Total – 27,046
1994 Brokers – 16,056 Salespersons – 7,542 Entities – 1,505 Total: 25,103	1996 Brokers – 16,507 Salespersons – 8,605 Entities – 1,732 Total – 26,844
1998 Brokers – 12,824 Salespersons – 6,222 Entities – 1,653 Total: 20,699	2000 Brokers – 12,880 Salespersons – 8,475 Entities – 2,024 Total – 23,379

2001-2002 REAL ESTATE CONTINUING EDUCATION REQUIREMENTS

All licensees, except those who were issued **either a Wisconsin broker's or a salesperson's license after January 1, 2001**, must satisfy the continuing education requirement during 2001-2002 in order to renew their license in a timely manner in the fall of 2002. The license renewal deadline is December 31, 2002. Licensees may complete the 2001-2002 continuing education after that date; however, the Department may not renew their license until such licensees complete the education and pay a late renewal fee.

There are 2 alternatives for completing the continuing education requirement:

Alternative # 1 Continuing Education Courses Approved by the Department

Four courses of at least 3 hours in length at a school approved by the Department. The 4th Course ONLY has options, which relate to specific areas of practice. Note that some schools are now offering these courses by distance learning (videotape, CD-ROM, the Internet, etc.). **The Department must approve a school before it offers courses and grants a certificate of attendance to a licensee.**

- | | |
|-----------|--|
| Course 1 | Use of Forms and Contract Law (Everyone must take.) |
| Course 2 | DRL Practice Guidelines and Broker Ethics (Everyone must take.) |
| Course 3 | New Developments (Everyone must take.) |
| Course 4A | General Real Estate Elective (Everyone must take this elective OR one of the other 4 electives.) |
| Course 4B | Supervising Broker Elective (Everyone must take this elective OR one of the other 4 electives.) |
| Course 4C | Commercial Elective (Everyone must take this elective OR any of the other 4 electives.) |
| Course 4D | Property Management Elective (Everyone must take this elective OR one of the other 4 electives.) |
| Course 4E | Rural/Farm/Vacant Land Elective (Everyone must take this elective OR one of the other 4 electives.) |

Alternative # 2: Continuing Education Test-Out Exam

This alternative will be available from July 1, 2001, until June 30, 2002. An exam brochure and an exam application form are available from the Department. Study materials may be purchased from the Department for \$6.00 (including tax, handling and postage).

Disciplinary Actions

EDWARD E HOFFER

WATERTOWN WI REPRIMAND/FORFEITURE

Failed to put into writing an agency agreement and failed to provide the required written agency disclosure. Forfeiture of \$1,000.00. Effective 9/27/01. Sec. 452.14(3)(i), Wis. Stats. RL 24.08, 27.07(4)(a)1., 2. Case #LS0109271REB

RITA L DUCAINE

CRIVITZ WI REPRIMAND/COSTS

Failed to depict in the 4/7/99, 4/11/00 and 6/12/00 journal entries, the name of the party giving earnest money. Failed to enter the \$300 earnest money received from a buyer in the journal. Failed to maintain a ledger system from 1/1/99 through 12/31/00. Failed to perform monthly reconciliations, trial balances and validations from 1/1/99 through 7/25/01. Failed to use current approved real estate forms and failed, through inadequate supervision, to ensure the use of current approved real estate forms by employees. Costs of \$750.00. Effective 2/28/02. Sec. 452.14(3)(i),(m), Wis. Stats. RL 18.13(1)(a), (2),(3),(4),(5), 24.17(3), 16.06(7), 17.08(1), Wis. Admin. Code. Case #LS0202281REB

MATTHEW F IMPERL

GREENFIELD WI REPRIMAND/COSTS

Failed to use approved forms by disbursing in a manner not directed in the written earnest money disbursement agreement \$190.00 of escrow money to an exterminating company for pest control by failing to have a written agency agreement with the sellers and by failing to put all agreements in writing. Complete preclicensing broker's course. Costs of \$250.00. Effective 12/6/01. Secs. 452.135(1), 452.14(3)(i),(L), Wis. Stats. RL 16.04(1), 18.09, 24.025(2), 24.08, Wis. Admin. Code Case #LS0109051REB

DAVID A DETTMANN

WAUSAU WI REPRIMAND/COSTS

Failed to be knowledgeable regarding laws, public policies and current market conditions on real estate matters and failed to assist, guide and advise the buying or selling public based upon these factors. Failed to put in writing the exact agreement of the parties relating to financial obligations regarding this transaction. Failed to provide brokerage services to all parties in the transaction honestly, fairly and in good faith. Failed to diligently exercise reasonable skill and care in providing brokerage services to all parties. Complete a salesperson preclicensing course. Costs of \$500.00. Effective 12/6/01. Secs. 452.14(3)(i),(L), 452.133(1)(a),(b), Wis. Stats. RL 24.08, 24.03(2)(c), Wis. Admin. Code Case #LS0108142REB

ACTION REALTY INC

SCHOFIELD WI REPRIMAND

Failed to appropriately supervise the real estate activities of a real estate salesman under his supervision and by

delegating supervisory responsibilities to a real estate salesperson and not to a real estate broker. Effective 12/6/01. Secs. 452.12(3)(a), 452.14(3)(i), Wis. Stats. RL 17.08(1),(2), 17.09(1), Wis. Admin. Code Case #LS0108142REB

ROBERT G RYBARCZYK

WAUSAU WI

REPRIMAND

Failed to appropriately supervise the real estate activities of a real estate salesman under his supervision and by delegating supervisory responsibilities to a real estate salesperson and not to a real estate broker. Effective 12/6/01. Secs. 452.12(3)(a), 452.14(3)(i), Wis. Stats. RL 17.08(1),(2), 17.09(1), Wis. Admin. Code Case #LS0108142REB

GORDON A BEHM

GREENVILLE WI

REPRIMAND/COSTS

Did not verify the status of a salesperson employee's license and allowed him to continue working as a salesperson after his license had expired. His license had expired on 1/1/1999 and was not renewed thereafter due to a tax delinquency and his failure to submit a timely renewal application. He was released from employment as of 7/15/2000. Pay costs of \$250.00. Effective 1/24/02. Sec. 452.12(3)(a), Wis. Stats. RL 17.07, Wis. Admin. Code Case #LS0201241REB

DAVID A SKROCKI

CAPE CANAVERAL FL

SURRENDER

In September, 2000, convicted of violating Title 18, United States Code, Section 1012, by having made false statements to the U.S. Department of Housing and Urban Development. Effective 9/27/01. Sec. 452.14(3)(i), Stats. RL 24.17(1) Case #LS0108141REB

ALAN R ALTERI

BROOKFIELD WI

REPRIMAND/COSTS

Failed to express the exact agreement of the parties, as to commission on a residential listing-contract-exclusive right to sell document, and attempting to amend that agreement by use of an unapproved form. Failed to express the exact agreement of the parties on a residential offer to purchase and a counteroffer as it related to the amount of commission to be paid. Complete broker's course. Costs of \$300.00. Effective 12/6/01. Sec. 452.14(3)(i),(m), Wis. Stats. RL 16.04(1), 16.06(8), 24.08, Wis. Admin. Code Case #LS0112062REB

KEVIN S BREMMER

RUDOLPH WI

REPRIMAND/FORFEITURE

In May, 1993, was convicted of misdemeanor theft in Wood County Circuit Court. In March, 1994, was convicted of 3 counts of misdemeanor theft in Portage County Circuit Court. Failed to timely report these convictions. Pay a forfeiture of \$500. Effective 1/24/02. Sec. 452.14(3), Wis. Stats. RL 24.17(1),(2),(3), Wis. Admin. Code Case #LS0201242REB

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Real Estate Board
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Telephone Directory

The Department of Regulation and Licensing uses an IVR Auto-Attendant Telephone System. This system may be accessed 24 hours a day for computerized licensing information. We ask for your patience as we perfect the system and remove some of the bugs we have encountered. You may continue to dial the following telephone number; **however, the extension numbers that had been published in past issues of the Regulatory Digest are no longer valid.** Please listen to the new menu for the new extension numbers. The number to dial is:

(608) 266-5511

Our Fax Number is: **(608) 267-3816**

Visit the Department's Web Site at:

www.drl.state.wi.us

For our new "Online Verification of Credential Holders" click on "License Lookup" button on the Department's home page.

Copies of the Regulatory Digest are on the Web.

Send comments to web@drl.state.wi.us

Board Meetings in 2002

Usually, the 4th Thursday of the month, unless cancelled. However, the November and December meeting dates are replaced by one meeting date: the first Thursday in December.

Wisconsin Statutes and Code

Copies of the Real Estate Board Statutes and Administrative Code can be ordered from the Department. Include your name, address, county and a check payable to the Department of Regulation and Licensing in the

amount of \$5.28. The latest edition is dated February 2001.

Change of Name or Address?

Please photocopy the mailing label of this digest, make changes in name or address, and return it to the Department. Confirmation of changes is not automatically provided.

WIS. STATS. S. 440.11 ALLOWS FOR A \$50 PENALTY TO BE IMPOSED WHEN CHANGES ARE NOT REPORTED WITHIN 30 DAYS.

Subscription Service

Bi-annual digest subscriptions are published for all Boards housed within the Department at a cost of \$2.11 each per year. CREDENTIAL HOLDERS RECEIVE THEIR REGULATORY DIGEST FREE OF CHARGE. Others may send the fee and this form to the address listed above.

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